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Supreme Court, U.S.
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No. 94-87

In The

# Supreme Court of the United States

October Term, 1994

ETHICON, INC.,

*Petitioner,*

v.

HELEN KIRWIN EISENMENGER, an incapacitated person, by VERONICA EISENMENGER, her Guardian and Conservator,

*Respondent,*

and

JAMES E. MUNGAS and MONTANA DEACONESS MEDICAL CENTER,

*Cross-Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## COUNTERSTATEMENT OF THE QUESTION PRESENTED

Do the Fifth and Fourteenth Amendments to the U.S. Constitution permit a state court to enter a default judgment against a defendant, pursuant to state procedural rules, as a sanction for years of willful, bad faith obstruction of the discovery process?

## LIST OF PARTIES

Petitioner, Ethicon, Inc.

Respondent, Helen Kirwin Eisenmenger, an incapacitated person, by Veronica Eisenmenger, her Guardian and Conservator.

Cross-Respondents, James E. Mungas and Montana Deaconess Medical Center.

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## OPINION BELOW

The opinion of the Montana Supreme Court is reported at 51 Mont. St. Rep. 296 and 1994 Mont. LEXIS 75. The state district court decision is unreported.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

## STATEMENT

On October 30, 1985, Helen Kirwin Eisenmenger (Eisenmenger) underwent a surgical procedure known as a left carotid endarterectomy[1] at Montana Deaconess Medical Center (MDMC) in Great Falls, Montana. James Mungas, M.D., a board-certified vascular surgeon, performed the surgery and closed the incision using a 6-0 Prolene suture manufactured by Ethicon. Dr. Mungas secured the suture by anchoring it at one end of the incision and sewing to the opposite end. This procedure is one of two commonly used closure techniques.[2] (Eth. App. at 252.)[3]

Fifty-four hours later, the suture broke at its midpoint. Dr. Mungas performed a second, emergency surgery and repaired the broken suture line. Following the

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[1] A carotid endarterectomy is the surgical removal of plaque on the intimal lining of a carotid artery.

[2] Petitioner now represents that this procedure is "not recommended by Ethicon." (Pet. at 4.) However, in deposition Ethicon's own in-house Director of Medical Affairs, and a board-certified surgeon, David Marshall, M.D., stated that Dr. Mungas' suturing technique was commonly used and was one of "two schools of technique". (Eth. App., p. 252.)

[3] Citations designated "Eth. App." refer to the Appendix that Ethicon filed with the Montana Supreme Court.

second surgery, Helen Kirwin Eisenmenger suffered a severe stroke.

## PROCEDURAL HISTORY

The procedural history of this case is much more detailed and complex than that outlined by Ethicon. Because a more comprehensive review of the history is necessary for the Court to have a meaningful understanding of what occurred, Dr. Mungas provides the following additional facts.

### A. The Federal Case

Eisenmenger initially brought this case as a product liability action against Ethicon in state district court on January 15, 1988. Ethicon removed the case to federal district court on the basis of diversity in February, 1988. In March of 1988, Ethicon answered Eisenmenger's Complaint with numerous defenses placing the cause of the suture's failure upon the negligence of Eisenmenger and the carelessness, misuse, and alterations of the suture by unnamed "others". (App. at 15, 16.)[4] Eisenmenger's second set of interrogatories sought to learn the identity of the "others" at fault for her injuries. Ethicon's responses to these interrogatories were evasive and incomplete.

On May 18, 1988, Ethicon retained a vascular surgeon, Cornelius Olcott, M.D., as an expert. Two months

[4] Citations designated "App." refer to the Appendix filed by Dr. Mungas with the Montana Supreme Court.

later, Dr. Olcott rendered his initial opinion to Ethicon. Dr. Olcott criticized almost every aspect of Dr. Mungas' and MDMC's care and treatment of Eisenmenger, from the initial diagnosis to post-surgical monitoring by the nursing staff.[5] (Eis. App. at 167-75.)[6] Despite knowledge of Dr. Olcott's opinions, Ethicon did not disclose the opinions and became increasingly deceptive and ambiguous in answering plaintiff's interrogatories.

Eisenmenger stipulated to the dismissal of the federal action, and refiled in state court, adding Dr. Mungas and MDMC as parties. (App. at 120-30.)

### B. The State Court Case

In the state court case, Ethicon again raised a number of "others did it" defenses. Eisenmenger, Dr. Mungas, and MDMC again sought discovery aimed at eliciting any facts, evidence, witnesses or opinions held by Ethicon which established any misuse, alteration, or mishandling of the subject suture by Dr. Mungas or MDMC. Ethicon again answered elusively.[7]

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[5] Ethicon concealed Dr. Olcott's opinions for almost four years. It was not until March 30, 1992, which was six weeks *after* Mungas and MDMC were granted summary judgment, that Ethicon first revealed them. It was this conduct on the part of Ethicon that formed the basis for the sanction imposed by Judge McPhillips.

[6] Citations designated "Eis. App." refer to the appendix that was filed by Mrs. Eisenmenger with the Montana Supreme Court.

[7] For example, an interrogatory asking if Ethicon *had any* information that anyone other then Ethicon was at fault was

Ethicon first disclosed the identity of Dr. Olcott on August 30, 1991, in response to a pretrial scheduling order; however, it neither supplemented nor amended any of its earlier discovery responses with his opinions, which were by this time two years old.[8]

Three days after Dr. Olcott was disclosed, Dr. Mungas propounded three pointed interrogatories directed specifically at determining all information, including opinions, possessed by Dr. Olcott or Ethicon that suggested that any conduct of Dr. Mungas was the cause of Eisenmenger's injuries. Ethicon's answers to these interrogatories were deceitful, incomplete, late and "patently incorrect."[9] (Pet. at 44a.)

On February 13, 1992, District Court Judge McPhillips granted summary judgment in favor of MDMC and Dr. Mungas based on the absence of any expert testimony on the deviation from the standard of care on the part of either defendant and upon the court's ruling that the doctrine of *res ipsa loquitur* was not applicable. The court's ruling was founded on and would not have occurred but for Ethicon's having withheld the opinions of its expert, Dr. Olcott. (App. at 179.)

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answered: "Objection. Ethicon objects to this interrogatory on the grounds that it seeks a conclusion of law." (App. at 154.)

[8] Ultimately, Ethicon responded to approximately 1700 written discovery requests and never mentioned Dr. Olcott's opinion in *any* of them.

[9] In its Memorandum and Order of May 11, 1992, the District Court found these responses to be "patently incorrect". (Pet. at 44a.)

Six weeks later, Eisenmenger deposed Dr. Olcott, who, without hesitation, criticized nearly every aspect of Dr. Mungas' care and treatment of Eisenmenger. (Eis. App. at 169-73.) Dr. Olcott further testified that Ethicon's counsel, Charles Preuss, had given him the case for review in 1988; that "in general" he had the same opinions in 1988 as at the time of his deposition four years later; that he discussed the case with Mr. Preuss in 1988; and that he had other conversations with Mr. Preuss over the "ensuing three or four years". (Eis. App. at 173-174.)

Eisenmenger immediately filed a Motion for Sanctions because of Ethicon's willful concealment of relevant evidence on issues critical to the case, namely, the conduct of Dr. Mungas. The state district court granted the motion on May 11, 1992, by entering a default judgment as to liability. This was based on the following conduct on the part of Ethicon:

> – Ethicon actively participated in numerous hearings in which the conduct of Dr. Mungas and MDMC was before the district court without revealing the existence of the evidence.
>
> – Ethicon had never responded correctly to interrogatories addressed to the issue; had responded incompletely and evasively to numerous other interrogatories; and had failed to seasonably supplement or amend answers to interrogatories addressed to the issue.

(Pet. at 26a-45a.)

Because the court had determined that Ethicon was liable, the Great Falls, Montana jury only had to determine the amount of Eisenmenger's damages.

### C. The Montana Supreme Court

Acting upon Ethicon's Petition, the Montana Supreme Court[10] reviewed the trial court record for abuse of discretion. (Pet. at 16a.) The Court held: "The record supports the District Court's finding that Ethicon's failure to respond to discovery requests was willful and in bad faith. . . . [T]he District Court did not abuse its discretion in imposing the sanction of default judgment . . . . " *Id.*

## REASONS FOR DENYING THE WRIT

### IN CASES IMPOSING SANCTIONS FOR DISCOVERY ABUSE, A TRIAL COURT'S PROPER APPLICATION OF MONTANA'S RULE 37(b) SATISFIES DUE PROCESS REQUIREMENTS.

This Court has held that if a trial court has properly applied Rule 37[11] in imposing sanctions for discovery abuse, due process is satisfied. *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 706 (1982). Under this rule, the focus of inquiry is whether, in imposing the default judgment against Ethicon, the trial court properly applied Montana Rule of Civil Procedure 37(d). Montana Rule 37(d) provides that upon a party's failure to answer interrogatories, the trial

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[10] The Montana Supreme Court's opinion is reprinted in the Petition starting on page 1a.

[11] A copy of the relevant portions of Montana Rule of Civil Procedure 37 is enclosed at Cross-Respondent's Appendix 1A.

court may make such orders as are just, including "any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule." Mont.R.Civ.P. 37(d). Rule 37(b)(2)(C) permits the court to render a default judgment against the disobedient party.

The trial court's proper application of this rule is established in Judge McPhillips' comprehensive Memorandum and Order. (Pet. at 26a-45a.) In it, he documented Ethicon's extensive failure to provide discovery, explaining why he entered the default authorized under Montana's Rule 37(b)(2)(C) stating:

> This Court recognizes that sanctions pursuant to Rule 37(d) as listed in Rule 37(b) should be tailored to the discovery abuse. Plaintiff has suffered extreme prejudice due to Defendant Ethicon's willful, deliberate and unconscionable discovery abuses. Defendant Ethicon's original responses were often evasive and incomplete. Defendant Ethicon failed to seasonably supplement the interrogatories served before August 31, 1991. As to the interrogatories served after August 31, 1991, Defendant Ethicon's answers are patently incorrect. Defendant Ethicon's actions have been willful and in bad faith. Defendant Ethicon has indulged in unpardonable gamesmanship. Defendant Ethicon has violated the basic principles and spirit of the rules of procedure.

(Pet. at 44a.)

Judge McPhillips' proper application of Montana's Rule 37(d) met the due process requirements of *Insurance Corp. of Ireland*, 456 U.S. at 706. On appeal, the proper test for review of the trial court's imposition of the sanctions

is abuse of discretion. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976). As such, the imposition of a Rule 37 sanction only violates due process if a trial court abused its discretion in the application of the sanction. *Id.* "The question, of course, is not whether this Court . . . would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." *Id.* at 639. The standard of review which the Montana Supreme Court employs in reviewing sanctions imposed by district courts is an "abuse of discretion" standard. (Pet. at 11a, *citing First Bank (N.A.) – Billings v. Heidema*, 711 P.2d 1384 (Mont. 1986).) The Montana Supreme Court acknowledged that the "record supports the District Court's finding that Ethicon's failure to respond to discovery requests was willful and in bad faith." (Pet. at 16a.) "We hold that the district court did not abuse its discretion in imposing the sanction of default judgement on the issue of liability." *Id.*

The due process test for use in imposing discovery sanctions is concise and straightforward. Ethicon attempts to confuse the issue by misconstruing this Court's decision in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909). The Court in *Hammond* held due process "was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." *Id.* at 351. This Court found the authority for the creation of this presumption to be of the same nature as a court's "authority to default . . . because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not

answering . . . ." *Id.* The Court found it analogous to "the many other presumptions attached by the law . . . ." *Id.*

Ethicon attempts to eviscerate this presumption by arguing that if the offender had a meritorious defense, the presumption is destroyed. This would nullify the presumption and allow those who abuse discovery by hiding "meritorious defenses" to profit with impunity. This is not the holding in *Hammond Packing*, and Ethicon attempts to lead the Court astray on this point. Nothing in *Hammond* requires a court to analyze defenses, "meritorious" or otherwise, which are concealed by discovery abuse. The defendant Hammond's defenses were not mentioned by the Court because they were, by statute, presumed to be without merit because of discovery abuses. Likewise, the merits of Ethicon's defense are irrelevant. As Justice White stated in a similar situation: "Petitioners are attempting to create a logical conundrum out of a fairly straightforward matter." *Insurance Corp. of Ireland*, 456 U.S. at 696.

By the virtue of this Court's holding in *Insurance Corp. of Ireland*, the due process requirements referred to in *Hammond Packing* for the imposition of default judgement are satisfied by Rule 37(b). 456 U.S. at 706. The trial court's proper application of Montana's Rule 37(b) is the test and it is consistently employed in all of the circuits.

Ethicon incorrectly cites Justice White's opinion in *Insurance Corp. of Ireland* for the following proposition: "Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption." (Pet. at 11.) Ethicon omitted the next sentence of the opinion, which is fatal to its argument. "A proper

application of Rule 37(b)(2) will, as a matter of law, support such a presumption." *Id.* at 706. In the instant case, the trial court properly applied Rule 37(d) Mont.R.Civ.P.[12] Under *Insurance Corp. of Ireland*, this application, as a matter of law, supports the *Hammond Packing* presumption.

Ethicon again extols its innocence in disputing the state district court's finding that it concealed material evidence, which the Montana Supreme Court approved. A similar situation confronted this Court in *Societe Internationale Puor Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). The Court dismissed attempts by a party to dispute the findings of the lower courts. *Id.* at 209. "We must dispose of this case on the basis of the findings . . . adopted by the District Court, and approved by the Court of Appeals." *Id.* In a like manner, the Montana Supreme Court held in this case: "The record supports the District Court's finding that Ethicon's failure to respond to discovery requests was willful and in bad faith. . . . [T]he District Court did not abuse its discretion in imposing the sanction of default judgement . . . ." (Pet. at 16a.) Thus, Ethicon's attempts to revisit the trial court's findings of fact are a misplaced and irrelevant distraction from the constitutional issues Ethicon's petition seemingly attempts to raise.

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[12] At time of the application, no corollary Federal Rule 37(d) existed; the Federal Rule was effective Dec. 1, 1993.

The trial court properly applied Montana's Rule 37. The Montana Supreme Court reviewed this imposition of sanctions and found no abuse of discretion by the trial court. The holding of the Montana Supreme Court should stand and petition should be denied.

## II

## THE CIRCUITS ARE UNIFORM IN HOLDING A TRIAL COURT'S PROPER APPLICATION OF RULE 37(b) SATISFIES DUE PROCESS REQUIREMENTS.

Ethicon seeks to portray a "very real conflict among the circuits" in need of clarification by the Supreme Court. (Pet. at 25.) An examination of the cases proves Ethicon is in error. The Circuits, including the Fifth and Ninth, are in harmony on this issue, all having held that a proper application of Rule 37(b) satisfies due process and that on review the imposition of Rule 37(b) sanctions is proper absent abuse of discretion by a trial court.

Ethicon's position that the *Hammond Packing* presumption has been extinguished by the abuse of discretion standard of review is without merit. This Court, in *Insurance Corp. of Ireland*, 457 U.S. at 705, held that Rule 37 sanctions embody the *Hammond Packing* presumption and that a proper application of it satisfies due process. "Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption. A proper application of Rule 37(b)(2) will, as a matter of law, support such a presumption." *Id.* at 706. Absent abuse of discretion, Rule 37 sanctions support the *Hammond Packing* presumption and thus satisfy due process. *Id.* at 706.

Recent cases on Rule 37 default judgments have not "extinguished" *Hammond Packing;* they embodied it. *Id.* at 705. This is manifestly clear from this Court's statement in *Insurance Corp. of Ireland*: "Rule 37(b)(2)(A) itself embodies the standard established in *Hammond Packing Co. v. Arkansas* . . . for the due process limits on such rules." *Id.*

Ethicon's manufactured conflict deconstructs under scrutiny of the cases Ethicon cites for its proposition. The basis of this argument is that the Ninth and Fifth Circuits are different from the remainder. For example, Ethicon claims that the Ninth Circuit "has long held that, under *Hovey* and *Hammond Packing,* a default judgement is only appropriate where the party's conduct gives rise to a presumption that it has no evidence to offer in support of its claims or defenses." (Pet. at 25.) Ethicon claims the Fifth Circuit also "follows" *Hammond* as does the Ninth and that this creates a "very real conflict". (Pet. at 25.) This is convenient fiction. Review of the Ninth and Fifth Circuit cases reveals that they and all the other circuits apply the same test.

## THE NINTH CIRCUIT

Ethicon cites five cases for its proposition that "a default judgement is only appropriate where the party's conduct gives rise to a presumption that it has no evidence to offer in support of its claims or defense". (Pet. at 21.) None of the cases Ethicon cites mention this proposition.

The latest three cases cited make no mention of either *Hovey* or *Hammond Packing,* let alone the presumption for

which Ethicon cites the cases. *Hovey v. Elliot*, 167 U.S. 409 (1897). In fact, all three cases stand for the *exact opposite* proposition: a default judgment is appropriate under Rule 37 only when sanctioning willful misconduct or bad faith, and the proper standard of review is abuse of discretion: "Absent a definite and firm conviction that the district court made a clear error in judgment, this court will not overturn a Rule 37 sanction." *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1408 (9th Cir. 1990). "We review the imposition of discovery sanctions under Rule 37 for abuse of discretion." *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1337 (9th Cir. 1985). "A district court's orders and sanctions relating to discovery *will be overturned only for abuse of discretion*." *Munoz-Santana v. U.S. I.N.S.*, 742 F.2d 561, 562 (9th Cir. 1984) (emphasis supplied).

**THE FIFTH CIRCUIT**

Ethicon offers only one case, *Chilcutt v. United States*, 4 F.3d 1313 (5th Cir. 1993), to support its position that the Fifth Circuit "follows" *Hammond*. *Chilcutt*, however, does not even involve a default judgment, and the sanctioned party was not precluded "from presenting its case in chief, the sanction was a far cry from a default judgement." *Id.* at 1320.

Although unmentioned in the petition, the Fifth Circuit has addressed the issue of default judgments as a sanction. In *Coane v. Ferrara Pan Candy Co.*, the Fifth Circuit held "[i]n exercising our appellate function, we review the imposition of Fed. R. Civ. P. 37 sanctions under an abuse of discretion standard." 898 F.2d 1030,

1031 (5th Cir. 1990). In fact, the Fifth Circuit implemented this Court's decision in *National Hockey League*, the very year it was decided. *Emerick v. Fenick Industries, Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976) (*citing National Hockey League*, 427 U.S. 639). "It is our responsibility solely to decide whether the district court could, in its discretion, have determined the appellant's conduct to be so flagrant as to justify striking its pleadings." *Id.*

There is no conflict between either the Ninth or Fifth Circuits and the other Circuits. All the circuits have implemented the abuse of discretion standard which this Court announced. *National Hockey League*, 427 U.S. at 642; *Farm Const. Services, Inc. v. Fudge*, 831 F.2d 18, 20 (1st Cir. 1987); *Jones v. Niagra Frontier Transp. Auth.*, 836 F.2d 731, 734 (2d Cir. 1987); *Mindek v. Rigatti*, 964 F.2d 1369, 1374 (3d Cir. 1992); *Mutual Federal Sav. & Loan v. Richards & Associates*, 872 F.2d 88, 92 (4th Cir. 1989); *Coane v. Ferrara Pan Candy Co.*, 898 F.2d 1030, 1031 (5th Cir. 1990); *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990); *Hindmon v. National – Ben Franklin Life Insurance Corp.*, 677 F.2d 617, 620 (7th Cir. 1982); *Comiskey v. JFTJ Corp.*, 989 F.2d 1007, 1009 (8th Cir. 1993); *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990); *Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir. 1993); *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542 (11th Cir. 1993); *Founding Church of Scientology v. Webster*, 802 F.2d 1448, 1457 (D.C. Cir. 1993).

There is no conflict among the Circuits. *All Circuits* apply the rule this Court announced in *National Hockey League*. Ethicon's second argument raises no conflict between the Circuits nor any other issue for the Supreme Court to resolve.

## III

## ETHICON HAS NOT DOCUMENTED ANY TREND TOWARD MORE SEVERE SANCTIONS FOR DISCOVERY ABUSE, NOR IS THERE ONE.

Ethicon would have the Court believe that the litigants in the courts of this country are victims of "anti-discovery abuse fervor run amok". (Pet. at 29.) Citing what Ethicon claims to be a "trend toward more severe sanctions," Ethicon begs this Court to intercede on its behalf and rescue it from the results of its own dishonest conduct. (Pet. at 26.) Once again, Ethicon's claims are illusory and wholly unsupported. Ethicon lists six examples of default judgements in federal cases involving large damage amounts. This list hardly constitutes statistical evidence of a trend toward increasingly severe sanctions by overzealous courts. The examples more likely indicate that when the claims involved are large, some litigants will choose to abuse the discovery process.

Assuming, for argument's sake only, Ethicon's contention that there is a growing trend of "anti-discovery abuse," the instant case is a poor instrument for cautioning the nation's courts. In addition to the extensive and egregious scheme of discovery abuse, this case also involves a Montana district court's sanction which Montana Rule 37(d) authorizes, a rule then without a parallel Federal Rule until December 1993. Montana Rule of Civil Procedure 37(d), Federal Rule of Civil Procedure 37(d).

Ethicon's argument that the system has "run amok" ignores that the courts of this country are fully capable of addressing and handling this issue with Rule 37. Appellate courts will check any overzealous district court

which abuses its discretion. The system worked to effectively address the discovery transgressions in the instant case. The district court applied the available sanctions in response to Ethicon's willful misconduct, misconduct which worked to impede conducting a trial on the merits. A default judgement on the issue of liability was granted by the district court. A Montana jury determined the amount of Eisenmenger's damages. The Montana Supreme Court affirmed the verdict after considering Ethicon's violations of the Montana Rules of Civil Procedure and finding no abuse of the Court's discretion. The Montana Supreme Court's decision should stand and the Court should deny Ethicon's petition.

## CONCLUSION

For all of the foregoing reasons, this Court should deny Ethicon's Petition for a Writ of Certiorari.

Respectfully submitted,

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# APPENDIX

Montana Rules of Civil Procedure

## RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS

. . . .

**(b) Failure to Comply With Order.**

. . . .

(2) ***Sanctions by Court in Which Action is Pending.*** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the

action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

. . . .

**(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a

proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).